IN THE

Supreme Court of the United States

October Term, 1954

No. 4

SPOTTSWOOD THOMAS BOLLING, ET AL., *Petitioners,*

v.

C. MELVIN SHARPE, ET AL., *Respondents.*

BRIEF FOR PETITIONERS ON FURTHER REARGUMENT

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On May 17th last, this Court disposed of the basic constitutional question presented by this case and companion cases by construing the due process clause of the Fifth Amendment and the equal protection clause of the Fourteenth Amendment as stripping federal and state governments of the power to require, authorize or permit the enforcement of racial segregation in the public schools. The Court said, moreover, that the formulation of decrees was made difficult "because these are class actions, because of the wide applicability of this decision and because of the great variety of local conditions ... We have now an-

nounced that [Segregation in public education] is a denial of the equal protection of the laws. In order that we may have the full assistance of the parties in formulating decrees, the cases will be restored to the docket, and the parties are requested to present further argument on Questions 4 and 5 previously propounded by the Court for the reargument this Term. The Attorney General of the United States is again invited to participate. The Attorneys General of the states requiring or permitting segregation in public education will also be permitted to appear as amici curiae upon request to do so by September 15, 1954, and submission on briefs by October 1, 1954."

Subsequently the time for filing of briefs for all parties was set for November 15, and these cases set down for re-argument December 6th.

QUESTIONS

Questions 4 and 5 left undecided, and now the subject of the discussion in this brief, follow:

4. Assuming it is decided that segregation in public schools violates the Fourteenth Amendment,

   (a) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, or

   (b) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions?

5. On the assumption on which questions 4(a) and (b) are based, and assuming further that this Court will exercise its equity powers to the end described in question 4(b),

(a) should this Court formulate detailed decrees in these cases;

(b) if so, what specific issues should the decrees reach;

(c) should this Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees;

(d) should this Court remand to the courts of first instance with directions to frame decrees in these cases, and if so, what general directions should the decrees of the courts of first instance follow in arriving at the specific terms of more detailed decrees?

PRELIMINARY STATEMENT

Since May 17th the School Board of the District of Columbia without awaiting a decree from this Court, has proceeded with implementation of a plan to desegregate the public school system of the District of Columbia. This so-called "Corning plan" has received wide publicity and has been referred to by many as a model plan for the desegregation of public school education. Since this Court is undoubtedly interested in what has taken place in the District of Columbia since its May 17th decision, we feel constrained to point out in some detail the development, modification, and operation of this plan. We likewise believe it will be of aid to the Court in its consideration of the answers to questions 4 and 5 to acquaint the Court with the framework within which this plan has been developed. In addition it also appears important to us that we give the Court our appraisal of this plan and its implementation. Under any thoughtful consideration of what has happened here, due deliberation must be given to the fact that this is the Nation's capital. It should also be borne in mind that the decision of May 17th is in line with the policy of the Federal Government.

These factors shed additional light on the events which have occurred since that decision. Any critical examination of what has taken place in the District of Columbia must be made in full awareness of the strong position taken by the President of the United States in not only urging immediate integration in the public schools of the District of Columbia but in also expressing the hope that the manner in which this transition from a segregated public school system to an integrated one might serve as a model for the rest of the country. The Commissioners of the District of Columbia took vigorous action in support of this position. The Corporation Counsel of the District of Columbia issued a clear cut opinion authorizing immediate action in the implementation of this position. The Board of Education then adopted a forthright and unequivocal policy calling for immediate integration. All of these actions occurred within the astonishingly short period of eight (8) days. It would also appear to us to be of some assistance to the Court to be advised that wherever unseasonable delay manifested itself in the plan proposed or in the steps taken in carrying out the plan that some one or more of these public officials or agencies insisted upon elimination of such delay and thus facilitated prompt action. It is in the light of this background that we wish to discuss with the Court the "Corning plan" and the steps taken thereunder in the District of Columbia.

DEVELOPMENT AND OPERATION OF THE CORNING PLAN

On December 17, 1952 the Board of Education directed Dr. Hobart Corning, the Superintendent, to formulate plans and to hold hearings on the integration of the then existing dual school system in the District of Columbia in the event that the Supreme Court should declare the dual school system to be unconstitutional. (Minutes of the Seventh (stated) meeting of the Board of Education, 1952-1953, held on December 17, 1952, p. 34.) The Superintendent

pursuant to this directive invited suggestions with regard to desegregation from interested persons and community organizations. Numerous responses resulted from these invitations. These responses were analyzed and tabulated, and reported upon by Dr. Corning to the Board. The Board invited organizations and citizens to appear and submit further suggestions. The materials submitted were referred to the Superintendent for the attention of his staff, looking forward to the submission of a plan of desegregation by the Superintendent.

The Superintendent advised the Board at its meeting on December 16, 1953, that he planned "to set up a series of meetings in the general field of inter-cultural relationships . . . " (Superintendent's Circular No. 79, Appendix B, p. 33.)

From December, 1953 until May 1954, a program of inter-cultural education was carried on among Dr. Corning's staff and to a limited extent among the teaching personnel. The superintendent stated that the purpose of his activity was not to deal "with segregation or integration as such or with the advantages and disadvantages of either system, but that we are dealing rather with the problem of developing desirable human understandings and relationships as we live together and work together for the education of all the children—no matter under what general plan the schools are organized." (*Ibid.*, p. 34.)

On the day this Court announced its opinion in this case, Superintendent Corning made a statement to the press that neither he nor the Board could do anything about desegregation until the Court had handed down its final decree. However, the next day, May 18, 1954, the District authorities decided not to wait for the re-arguments on the method and timing of integration nor for this Court's final decree. On that day the members of the Board of Education and Superintendent Corning, along with the Corporation Counsel for the District of Columbia, The Honorable Vernon West, met with the Commissioners of the

District of Columbia. The Corporation Counsel advised them that the decision of this Court made Acts requiring separation of the races in public education unconstitutional; that the Board could determine the mechanics and time of integration; and that there was nothing to prevent the school authorities from desegregating as soon as they deemed advisable. At this meeting Commissioner Samuel Spencer disclosed that President Eisenhower had expressed the hope that the District would become a "model" for the nation in school integration. (Washington Post-Times Herald, May 19, 1954, p. 1 col. 7, p. 6 col. 3.)

The Board at its next regular meeting, May 19, 1954, decided to have a call meeting on May 25, 1954 for the purpose of hearing the Superintendent's report on the matter of desegregation of the public schools. A resolution was presented to the Board that "the Board enunciate in advance of the consideration of any plan proposed by the Superintendent, a clear and unequivocal statement of principles which shall govern in the adoption and execution of the Superintendent's proposed plan", and that the President appoint a special committee for the purpose of drafting such a set of principles for presentation to the Board at the May 25 meeting.

During the discussion of the resolution, the Superintendent strenuously objected to this proposal saying, ". . . he is wholly in accord with the establishment by the Board of an unequivocal set of principles. He stated further, however, that he has been working for weeks in the preparation of a set of principles to recommend to the Board and that he believed his report would be almost useless if the Board, prior to receiving his report, established a set of principles. He stated that his report is not a detailed administrative report except insofar as it illustrates how the principles would operate. He stated further that he was prepared to present to the Board at its special meeting on May 25, 1954, a specific set of principles with the firm recommendation that they be adopted as an

unequivocal set of principles to govern the administrative procedures to follow. He stated that he had no objection to another set of principles being suggested, but that it was his thought that inasmuch as work had been put upon this matter of principles, he felt the Board should first give consideration to his report which the Board could amend, revise or eliminate."

"... The Superintendent stated that whatever principles are adopted and whatever administrative devices are applied will require a great deal of time beyond the establishment of principles."

The resolution was adopted by the Board and the committee was appointed. (Minutes of the Twelfth (stated) Meeting of the Board of Education, 1953-54, May 19, 1954.)

At its May 25th meeting the Board adopted the following policy:

> "In the light of the decision of the Supreme Court of the United States in Bolling v. Sharpe, the Board of Education of the District of Columbia, believing it to be in the best interest of all citizens of the community of Washington, and necessary to the effective administration of an integrated system within the public schools, hereby adopts the following declaration of policy:
>
> 1. Appointments, transfers, preferments, promotions, ratings, or any other matters respecting the officers and employees of the Board shall be predicated solely upon merit and not upon race or color.
>
> 2. No pupil of the public schools shall be favored or discriminated against in any matter or in any manner respecting his or her relationship to the schools of the District of Columbia by reason of race or color.
>
> 3. Attendance of pupils residing within school boundaries, hereafter to be established, shall not be permitted at schools located beyond such boundaries, except for the most necessitous reasons or for the public convenience, and in no event

for reasons related to the racial character of the school within the boundaries in which the pupil resides.

4. The Board believes that no record should be kept or maintained in respect to any pupil not enrolled in a public school on or prior to June 17, 1954, or in respect to any officer or employee not employed within the system on or prior to that date in which information is solicited or recorded relating to the color or race of any such person.

5. That the maximum efficient use shall be made of all physical facilities without regard to race or color.

In support of the foregoing principles, which are believed to be cardinal, the Board will not hesitate to use its full powers. It is pledged to a complete and wholehearted pursuit of these objectives.

We affirm our intention to secure the right of every child, within his own capacity to the full, equal and impartial use of all school facilities, and the right of all qualified teachers to teach where needed within the school system. And, finally, we ask the aid, cooperation and good-will of all citizens and the help of the Almighty in holding to our stated purposes." (Minutes of the 13th (Special) Meeting of the Board of Education, 1953-1954, held May 25, 1954, and Recessed Session held June 2, 1954, pp. A-8-9, App. pp. 1-15.)

After adopting this declaration of principles, the Superintendent was called upon to present his plan for integration. The "Corning Plan" was then presented by the Superintendent.

This plan was prefaced by the following statement:

1. *Complete desegregation of all schools is to be accomplished with least possible delay.*

Desegregation by grades or by levels would delay the process and would create administrative problems arising from confusion and inconsistencies.

2. *New boundaries are to be established for each school.*

Definite boundaries will be established for each school to make the optimum use of the school by the pupils living in its immediate area.

In sections of the city where schools are located very close to each other it will be impossible to set up separate boundaries for each school. In such instances, therefore, the boundaries will be for groups of schools rather than for individual schools.

When the new boundaries have been established and the plan is in operation, adherence to the boundary limitations must be definite and without exception.

This does not mean, however, that there will be any change in the present practice of adjustments of any school boundaries by the Superintendent wherever changes in school population make such action necessary. These boundary readjustments during the period of transition to a desegregated system will probably be more frequent than they are at present.

3. *Appointments and promotions of all school personnel are to be made on a merit system only and assignment will be in accord with the needs of the service.*

The tenure rights of individuals as to salary level and rank will be maintained.

The duties of some officers will necessarily be changed.

4. *The transition to a desegregated system is to be accomplished by natural and orderly means.*

Artificial and immediate reassignments of large numbers of pupils, teachers, and officers would be disruptive and will be avoided." (*Ibid.*, p. A. 16)

The report next proceeds with a consideration of the distribution of pupils and of school boundaries. The following

criteria are provided for governing the distribution of pupils:

"1. the optimum use of all school buildings, and

2. the optimum accessibility of school buildings to the residences of pupils.

These criteria according to the plan necessarily require the establishment of definite zones to be served by each school or group of schools with the exception of the teachers colleges and the vocational and technical high schools which are specialized in nature and will continue to be city-wide in their services." (*Ibid.*, p. A. 17)

This plan provides for an option for students presently enrolled in the District of Columbia system at any level to remain at the school until graduation from that level in order to avoid immediate displacement of large numbers of pupils. It provides the following procedures for carrying this out:

"1. Fixed zones are to be established for each elementary, junior high and senior high school to insure balanced use of school facilities.

2. All pupils new to the school system or to a particular school level will be assigned to the schools designated to serve the zones in which they live.

3. All pupils at present enrolled in a given school may remain until graduation provided the school is not overcrowded and provided the priority rights of pupils within the new boundaries of the school are not denied. If they prefer they may transfer to the school serving the zone in which they live. Elementary school pupils who change residence will be transferred to the school assigned to the area of the new residence.

4. Transfers from one school to another will be required when necessary to relieve overcrowded conditions." (*Ibid.*, p. A. 17-18.)

In keeping with the directions of the Board of Education the plan next set forth a proposed schedule (*Ibid.*, pp. A. 21-25.) This schedule provided for the completion of the drawing of new boundaries for the public schools by September, 1954. (*Ibid.*, p. A. 21.) It provided for limited transfers of elementary and junior high school pupils solely to relieve overcrowding by September, 1954. (*Ibid.*, p. A. 21-22.) It further provided for a beginning of a merger of the McKinley and Armstrong technical high schools at the same time. (*Ibid.*, p. A. 22.) In addition, provision was made for students of all races to attend the Miner and Wilson Teacher Colleges by September, 1954. (*Ibid.*, p. A. 22-23.)

The plan next enumerated a series of administrative actions which needed to be taken which caused the Superintendent to feel that he could make no more progress toward desegregation in the public schools by September, 1954 than indicated in the paragraph above. He also indicated that the need for legislative changes supported this delay. (*Ibid.*, p. A. 22.)

The plan continues with these observations:

> "If the Board approves the Superintendent's plan and if there are no such setbacks as the failure to secure such legislative changes as the Corporation Counsel deems necessary or to secure funds that may be necessary to accomplish the physical changes in schools and in the redistribution of classroom equipment and supplies, the Superintendent feels that he can complete the changeover to a desegregated system by September, 1955.
>
> "It is the belief of the Superintendent that he can not in September go beyond the steps outlined in this report because of the lack of sufficient time before the close of school in June as the presence of pupils, teachers, and officers is essential to the carrying out of these plans. The official school calendar specifies June 17, as the last day for pupils; June 18, as the last day for teachers; and July 1 through August 31, as the summer vacation period for field officers. The field

officers are, of course, subject to call during this vacation period if their services are needed." (*Ibid.*, p. A. 23-24.)

As regards personnel, the Superintendent set no dates, but stated that persons presently employed would not be moved immediately, and that new personnel would be assigned in accordance with the needs of the service. Staff personnel would continue to exercise their current functions. (*Ibid.*, pp. A. 19-21.)

The Board heard the Superintendent read this report and immediately recessed until June 2. On June 2 the Board met and discussed the Superintendent's report—that is the "Corning Plan" as described above. (*Ibid.*, pp. A. 35-61). The Superintendent then submitted a statement to the Board in which he sought to justify the validity of the "option" plan and to further support his position that it was administratively impossible to put his plan into effect in September, 1954, except for the emergency transfers indicated above. In this statement the Superintendent conceded that he could establish new school boundaries by July 1, 1954; but, he stressed vigorously his viewpoint that it was administratively impossible to make any significant assignment of pupils by September, 1954. In this statement it was pointed out that emergency transfers referred to would provide for the transfer of about 2,700 Negro pupils into the previously all-white elementary and junior high schools. (*Ibid.*, pp. A. 62-66.)

The Superintendent's report of May 25 was accepted and filed and Dr. Corning was instructed to complete the designation of school boundaries and present maps to the Board on July 1 and to submit to the Board on June 23 a specific schedule covering the steps in desegregation. (*Ibid.*, p. A. 74.)

In the Board Meeting of June 23, 1954, Superintendent Corning outlined the steps in the desegregation program which had been taken and were to be accomplished,

with their respective dates. (*Ibid.*, A. 41-46.) The schedule has been carried out to date except in instances and manners as hereinafter noted:

June 8	Temporary reorganization of the two Boards of Examiners into one Board under the direct chairmanship of the Superintendent.
June 10, 11, 12	Teacher examinations for elementary, junior high, and vocational high schools on a completely integrated basis.
June 11	Notices sent to all high school principals announcing that both Miner and Wilson Teachers Colleges are receiving applications for admission in September from any qualified person, regardless of race.
June 11	Instructions issued to Heads of Departments of Military Science and Tactics to prepare and submit suggested plan for integration of cadet program for 1954-55 school year.
June 14	Meeting of First Assistant and Associate Superintendents concerned, Directors of Health, Physical Education, Athletics, and Safety, and Directors of Athletics to discuss all sports programs for 1954-55 school year. Directors of Athletics to report back on June 24 with suggested schedules.
June 14	First field officer examination announced on a city-wide basis (five such announcements issued to date).
June 15	Completion of tabulation and listing of data from registration cards for approximately 100,000 pupils.
June 17	Preliminary steps completed to effect transfers of pupils in elementary, junior high, and senior high schools listed in Superintendent's report of May 25 (Proposed Schedule, pp. 7-8)
June 23	Revised legislative language submitted to the Board covering necessary amendments to existing law because of Supreme Court decision—

Concerning First Assistant Superintendent
Concerning Chief Examiners
Concerning Board of Examiners
Concerning School Censuses

July 1	Superintendent to submit to Board maps and descriptive data to show new boundary lines for all elementary, junior high and senior high schools.
July 1	All necessary data concerning new boundaries to be furnished school principals and press to insure publicity reaching all school personnel and patrons.
	Superintendent to submit recommendations for merging of all lists of persons eligible for appointment to all teacherships on all levels.
September 1	Use of new boundaries on all levels for all pupils new to the public schools including kindergarten and first grade pupils entering the public schools for the first time.
	(12,000 children affected. Change moved up by three months and put into operation.)
September 13	Evening schools to open for operation on an integrated basis.
September 13	Transfers of selected Division 2 elementary school pupils who, because of present boundaries, are required to travel excessive distances where there are present Division 1 schools near their homes. This is possible as it involves a limited number of pupils and in no instance will require reorganization in a school receiving pupils or the transfer of furniture or equipment.
	(Approximately three hundred transferred.)
	(Pupil changes and transfers were made in the elementary schools, junior high schools, senior high schools, teachers colleges and evening schools. Estimated number of pupils transferred was 2903.)
September 13	Completion of building organizations including the transfer of teachers in some schools.
September 13	Completion of transfer of furniture and equipment and textbooks and classroom supplies between schools affected by pupil transfers.
October 1-15	Explain to all pupils the options provided either for remaining in present schools or transferring to new schools. (Prior to this date, this phase was accelerated.)
	Hold meetings for parents of all children who are qualified to request options to explain the choices

although no assurance can at that time be given whether the options can be approved for February 1 or for a later date.
(Meetings of parents not held as provided for.)

Written statements to be filed not later than November 11 confirming all options requested. Sixth, ninth and twelfth grade pupils not to be transferred.

(Transfers not made in the sixth, ninth and twelfth grade pupils, except in instances showing hardships. Senior High, 400 Negroes transferred to white school. Junior High, 525 Negroes transferred to white school. Elementary, 900 Negroes transferred to white school.)

The Superintendent repeats his desire to take such additional progressive steps as are consistent with the welfare of the children. He will, therefore, examine and tabulate all the written options that are filed to determine the numbers of pupils residing outside the new boundaries who wish to remain in their present schools and the numbers of those who wish to transfer to the schools serving their residence areas. On the basis of these findings he will then make such changed pupil assignments as are found feasible without forced transfers at the beginning of the new semester in February.

(Transfers being made with changes of address and in accord with zoning for new pupils)

On September 22, 1954, Superintendent Corning summarized the progress made in desegregating the public schools. He reported that the following things had been accomplished: (1) Schools reorganized; (2) Teachers' eligible register merged and appointments made therefrom; (3) Pupils transferred in accordance with the administration's plans; (4) Furniture, etc. moved; (5) Faculties in more than one-fifth of the schools rendered bi-racial; (6) Committee set up to consider "hardship cases," received about 700 requests for relief, processed about 500, granted about 60%, rejected about 10 percent and placed the remaining 30% under the "option" category

to be disposed of later; (7) new kindergartners, new first graders and all pupils attending Washington schools for the first time assigned on the basis of the new boundaries; (8) more than 3000 elementary and junior high school pupils transferred to new schools to relieve over-crowding; (9) about 100 children transferred to avoid necessity of travelling long distances; (10) Youth Council Centers established at Thomson and Walker-Jones Schools [student bodies bi-racial not faculties]; (11) 20 mentally retarded children and 3 special teachers assigned to the Military Road School [actually only 8 pupils—3 Negro and 5 white—and 3 teachers—2 Negro and 1 white—were assigned here]; (12) merging of McKinley and Armstrong started with a transfer of several hundred (346) children to McKinley; (13) Miner and Wilson Teachers Colleges opened to all qualified applicants [no whites at Miner, 32 Negroes at Wilson]; (14) all evening schools opened on an integrated basis; (15) on September 20 about 460 applications for transfers on the basis of options filed by senior high school pupils [467 eventually granted]; (16) on September 27, 560 applications filed by junior high school pupils [488 eventually granted]; (17) on September 27, about 2400 applications filed by elementary school pupils [none granted, at first because a strike against desegregation existed in the secondary schools, later about 900 transfers in the secondary schools effected, the remainder not acted upon.] (Minutes of the Fourth (Stated) Meeting of the Board of Education, 1954-55, September 22, 1954, pp. A. 18-22. Matters in brackets obtained by us from the District of Columbia School Officials.)

We turn now to an appraisal of the "Corning Plan", and our answers to Questions Four and Five propounded by this Court.

ARGUMENT

I

In Answer to Question 4a This Court Must, and in Answer to Question 4b This Court Should Issue a Decree Ordering Forthwith Desegregation of the Public School System of the District of Columbia.

Again stated, Question 4 is:

4. Assuming it is decided that segregation in public schools violates the Fourteenth Amendment,

(a) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, or

(b) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions?

With respect to these questions petitioners reaffirm the views set forth in their brief on reargument heretofore submitted[1] wherein it is urged that this Court should by its decree direct respondents forthwith to admit petitioners to schools of their choice within the limits of normal geographic school districting. This Court, having decided that segregation in public schools is violative of the Fifth Amendment should decree that respondents, lacking the constitutional power to assign pupils to public schools on the basis of race, immediately cease and desist using race as a factor in making such assignments.

Supporting of that position are the cases decided by this Court enunciating the proposition that the rights here involved are personal and present. *Sweatt* v. *Painter,* 339 U.S. 629, 635; *Sipuel* v. *Board of Regents,* 332 U.S. 631, 633; *Missouri ex rel. Gaines* v. *Canada,* 350 U.S. 337, 352; *Brown* v. *Board of Education,* 347 U.S. 483; *Bolling* v. *Sharpe,* 347

[1] Brief for Petitioners on Reargument No. 8, October Term, 1953, pp. 89-94.

U.S. 497. The present, personal rights of children who are growing through their formative years necessitate forthwith vindication if they are not to be irretrievably lost.

Petitioners also adopt the arguments urged in the joint brief filed by the pupils and parents in the State cases. Further, petitioners reaffirm the position taken in their brief on reargument hereinbefore mentioned which is in essence that no power exists in this Court to postpone the enjoyment by petitioners of rights constitutionally protected, especially where, as here, the unconstitutional conduct of respondents is causing injury to the most important secular claims that can be put forward by children, the claim to their full measure of the opportunity to learn and grow, and to be treated as entire citizens of the society into which they have been born. In the words of the Delaware Court:

> ". . . To require the plaintiffs to wait another year under present conditions would be in effect partially to deny them that to which we have held they are entitled." *Gebhart* v. *Belton*, 91 A. (2d) 137, 149.

Moreover, even should this Court conclude that its equity powers do permit an ending of a segregated school system to be accomplished by means of an *effective gradual adjustment*, assay of the factors involved makes it clear that in the District of Columbia it would be both unnecessary and unwise to exercise such powers. The factual situation in the District of Columbia makes a gradual decree unnecessary. Racial segregation has disappeared from virtually every phase of life in the District where Negroes and whites live side by side, work together, dine together and recreate in the same places and in general live their lives without racial distinction, save in the public schools. As has been heretofore indicated, since May 17, 1954 the great majority of individuals and organizations in the District have worked and are working with great zeal to achieve the implementation of this Court's decision without awaiting the decree of this Court. In this atmosphere it is sub-

mitted that it would be an unwise exercise of equity powers were this Court to do other than grant a forthwith decree.

In specific implementation of their answer to question four (b) and as an aid to the Court in its consideration thereof, petitioners would like to call to the attention of the Court the experience in the District of Columbia with the *Corning Plan* for desegregation of the District school system.

This Court has questioned whether it might permit a gradual adjustment from a segregated school system to one not based upon race. We have already indicated that in our opinion no power exists in the Court to postpone relief and we address ourselves to that question on the assumption that the Court finds that such power does exist. Even if this Court finds that such powers exist, we submit, that the power should not be exercised in this case. It needs no citation of authority to establish that the defendant in equity who asks the chancellor to go slowly in upholding the adjudicated vital rights of children accruing to them under the Constitution must make out an affirmative case of crushing conviction to sustain his plea for delay.

The experience in the District of Columbia with the Corning Plan substantiates the empirical studies of actual cases of desegregation of public schools and other social institutions, and rebuts the possibility that an affirmative case can be made out to prove that there is any compelling and valid justification which would sustain the delay implicit in the plan.[2]

At the very outset we desire to make our position clear that we do not agree with counsel for the respondents in

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[2] Ashmore, Harry S., *The Negro and the Schools*, Chapel Hill: University of North Carolina Press, 1954;

Clark, Kenneth B., "Desegration: An Appraisal of the Evidence", *The Journal of Social Issues*, 1953, 9, No. 4, 1-77;

"Next Steps in Racial Desegration in Education", *Journal of Negro Education*, Summer 1954, 23, No. 3, The Yearbook Number 23, 1-399.

their publicized position that desegregation of the public schools in the District of Columbia has been accomplished in compliance with the pronouncement of this Court in its decision of May 17th. It is our appraisal of the plan put in operation in the District of Columbia that respondents have advanced on the assumption that this Court has accepted the theory of an effective gradual adjustment of the transition from a segregated system to a system not based on color distinctions and they have discounted the propriety of a forthwith disposal of this matter upon its merits, and have launched upon this gradual plan which is replete with errors and pitfalls. There is a basic inconsistency between the protestations of immediacy by the respondents and the gradualism contained in the program and demonstrated in its operation.

The inequities and partial or complete denial of constitutional rights which are necessarily inherent in any plan providing for postponement of constitutional rights are highlighted by a discussion and critique of the "Corning Plan" as administered by the District of Columbia which plan contains elements of both forthwith desegregation and gradualism. Here the gradualist element has caused not only a denial of present constitutional rights to some pupils, but has also been the genesis of many administrative difficulties in the past. It presages many more difficulties for the future, most all of which would be avoided by the adoption of a forthwith plan.

The principal areas of objections to the Corning Plan are (1) the delay in completely desegregating the public school system and (2) the insertion of a plan of student options designed to defeat effective desegregation as contemplated by the May 17th decision and by the policy declaration of the Board.

(1) An examination of proposals and statements of Superintendent Corning indicates that administratively he was of the opinion that the only desegregation which could take place in the District by September 1954, was the lim-

ited desegregation involved in relieving overcrowding; the merging of Armstrong and McKinley; and the opening of Wilson and Miner Teachers Colleges without regards to race. As a matter of fact, the Superintendent stated that he could not even draw boundary lines before September 1954. But when the Board took its position and told Dr. Corning to act forthwith, the Superintendent found that he could draw the boundary lines by July 1, 1954, and could partially desegregate in all levels by September, 1954, which he accordingly did. That is, the Superintendent took an administrative position of gradualism from which he receded step by step. The experience here in the District of Columbia demonstrated that extended time to desegregate was not necessary, which is in line with the results of studies made in the field of desegregation.[3]

It should be noted in this connection that part of the administrative indecision and delay was repeatedly justified by Dr. Corning on the basis that he was acting in advance of a final decree in this case.

It is the petitioners position that the Corning Plan taken out of its setting and transplanted into another would occasion greater delay, confusion, and extended, if not complete, denial of constitutional rights.

We should like to call the attention of the Court to the repeated statements by the Superintendent of Schools that certain steps in desegregation were necessary because they were educationally sound, not for the purpose of discrediting the Superintendent, but for the purpose of emphasizing to the Court that claims of educational unsoundness as justification for delay and other administrative actions are, to say the least, unreliable.

(2) The provision for an option, which the Superintendent engrafted upon a boundary system, created anticipated

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[3] Clark, Kenneth B., "Desegregation: An Appraisal of the Evidence", *The Journal of Social Issues*, 1953, 9, No. 4, 1-79, 36.
Ashmore, Harry S., *The Negro and the Schools*, Chapel Hill: University of North Carolina Press, 1954, 70-71.

confusion and so-called hardship cases. It was difficult for some and impossible for others to understand the operation of this phase of the plan, so that many did not exercise these options because they did not know whether they could, or when they could, exercise them. Some people did not exercise the option to remove their children from the school they had been attending outside the new boundary to the school within the new boundary for fear of the hostility which would be accorded the children in the new school because they would be "bumping" former students. This piecemeal desegregation thus produced the very ills forecast by the experts.[4]

The option provision in effect takes the authority to operate an orderly integrated system from the Superintendent and delegates it to the parents of each child. The option plan has not in fact operated as Dr. Corning has promised that it would. At one place in the plan we find this language:

> "Any child living in the area of School "A" may attend that school if he so desires even though he may now be enrolled in School "B" or in some other school.
>
> "It should be noted that all children living within the boundaries of any given school *will have first priority for attending that school.*"

This on its face seems a fair proviso but the application of the rule, with the required sanction of the Superintend-

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[4] Kutner, Bernard; Wilkins, Carol; Yarrow, Penny Rechman, "Verbal Attitudes and Overt Behavior Involving Racial Prejudice", *The Journal of Abnormal and Social Psychology*, 1952, 47, 649-652;

LaPiere, R. T., "Attitudes vs. Action", *Social Forces*, 1934, 13, 230-237; Saenger, Gerhart and Gilbert, E., "Customer Reactions to the Integration of Negro Sales Personnel", *International Journal of Opinion and Attitude Research*, 1950, 4, 57-76;

Deutsch, Morton and Collins, M. E., Interracial Housing, *A Psychological Study of a Social Experiment*, Minneapolis; University of Minnesota Press, 1951;

Chein, I.; Deutsch, M.; Hyman, H.; Johoda, M.—Editors, "Consistency and Inconsistency in Intergroup Relations", *The Journal of Social Issues*, 1949, No. 3, 1-63.

ent, is having the following demonstrated result: Child John Doe (Negro) lives now in an area within the boundaries serviced by School A (white) and expresses the desire to go to School A. The Superintendent denies this right on the ground that School A will be overcrowded by that transfer, although the place which John Doe seeks to occupy is being held by one or more children (white) who live outside of the area of School A. In others words, exactly contrary to the wording of the plan, the preference is given to the child outside of the boundaries of the school. Thus attendance with race fundamentally as the controlling factor is being perpetuated. That this is designedly done and that there is no immediate relief in sight is voiced by the Superintendent himself in his announced projected plan:

> "The Superintendent repeats his desire to take such additional progressive steps as are consistent with the welfare of the children. He will, therefore, examine and tabulate all the written options that are filed to determine the numbers of pupils residing outside the new boundaries who wish to remain in their present schools and the numbers of those who wish to transfer to the schools serving their residence areas. On the basis of these findings he will then make such changed pupil assignments as are found feasible without forced transfers at the beginning of the new semester in February."

Our investigation discloses no instance where a single Negro child has been transferred from a school which he has previously attended because of race to a school from which he was previously excluded because of race where to do so would have meant the displacement of a white student. To the contrary, we have come upon instances where white children required by Board rules to attend schools formerly all Negro have been permitted to transfer to schools predominantly white on the alleged ground of "hardship". We respectfully submit that this so-called "hardship" is nothing less than having to attend a public

school within his boundary where his racial group is in the minority. The granting of such transfers by the School Administrator is an admission and acceptance of this as hardship. In addition, the granting of such transfers is assigning students on the basis of race in contravention of this Court's decision of May 17th, and in violation of the expressed policy of the Board of Education stated in the following language:

> "Attendance of pupils residing within school boundaries, hereafter to be established, shall not be permitted at schools located beyond such boundaries, except for the most necessitous reasons or for the public convenience, *and in no event for reasons related to the racial character of the school within the boundaries in which the pupil resides.*" (Minutes of the 13th (Special) meeting of the Board of Education, 1953-1954, held May 25, 1954, p. A 8.)

This is further evidence that this plan not only embraces the principles of gradualism but fosters the denial of effective desegregation.

It appears to us that the Corning Plan as evolved and operated in the District of Columbia tends to nullify the decision of May 17th in two ways: (1) The option features of the plan operate to fasten aspects of the segregated system upon the purportedly desegregated system, and (2) the lack of known standards by which the administrators of the plan are to determine when desegregation is to take effect and why desegregation is to be delayed subject petitioners declared constitutional rights to the uncertain whims and caprice of school authorities, and argues for a forthwith decree, rather than a decree permitting gradualism.

II

If This Court Should Decide to Permit an "Effective Gradual Adjustment" From a Segregated School System to a System Not Based on Color Distinctions, It Should Not Formulate a Detailed Decree But Should Remand This Case to the Court of First Instance With Specific Directions.

In addressing themselves to the problems posed by the several parts of Question 5, petitioners submit that a crucial factor in determining the kind and character of decree which this Court should enter, is the factor of respondents' actions taken and proposed as hereinabove described looking toward the de-segregation of the public schools in the District of Columbia. Based on respondents' own prognosis the outer limit in point of time required for the necessary adjusment of the school system from a segregated system to one not based on race or color is September, 1955. Inasmuch as the bulk of the deficiencies in the proposed plan to which petitioners have called attention are deletions, their adoption will not extend but tend to shorten the time needed for transition. An additional factor which is submitted as a consideration underlying the choice of form of decree is the atmosphere of integration, to which attention has been called, extant in the District of Columbia.

For the reasons enumerated above it would appear crystal clear that it would be injudicious for this Court to undertake the formulation of a detailed decree in this case. Neither is it needful that the decree reach the specifics which have been considered by the Board of Education and implemented by its action. Nor should this Court appoint a special master since all pertinent evidence is already before this Court and is of record for the use both of this Court and the District Court as well.

It is petitioners' position that this Court should issue its mandate directing that the District Court enter a decree enjoining respondents forthwith from imposing distinctions based on race or color in the administration of the public schools of the District of Columbia and directing that each child eligible for public school attendance in the

District of Columbia be admitted to the school of his choice not later than September, 1955, within the limits set by normal geographic school districting.

CONCLUSION

It is respectfully submitted that in light of the decisions of this Court to the effect that respondents lack the constitutional power to use race or color as a basis for the administering of the public schools in the District of Columbia and that it is in violation of Petitioners' rights under the Fifth Amendment to the Constitution of the United States to be excluded from any of such schools on the basis of race or color, this Court should therefore by its mandate require the entry of a forthwith decree restraining Respondents from using distinctions based on race or color in the administration and operation of the public school system in the District of Columbia.

Respectfully submitted,

(s) .....

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